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# Supreme Court of the United States

OCTOBER TERM, 1946.

No. 825.

OSMOND Y. LADD AND PAUL H. TODD,
*Petitioners,*

*v.*

BARTHOLOMEW A. BRICKLEY, TRUSTEE, SECURITIES & EXCHANGE COMMISSION AND OTHERS.

## BRIEF FOR INTERNATIONAL PAPER COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI

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New York, January 22, 1947

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# Supreme Court of the United States

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OSMOND Y. LADD and PAUL H. TODD,
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No. 825.

## BRIEF FOR INTERNATIONAL PAPER COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI

### OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals, not yet reported, appears at record pp. 1721-36.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 14, 1946 (R. 1736). The petition for writ of certiorari was filed December 28, 1946. The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 28 USC § 347(a).

### STATUTES INVOLVED

Rule 52 of the Federal Rules of Civil Procedure provides in part:

> "(a) In all actions tried upon the facts without a jury, the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; . . ."

Rule 66 provides:

> "The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts, but all appeals in receivership proceedings are subject to these rules."

Section 11(d) of the Public Utility Holding Company Act of 1935, 15 USC § 79, provides that in any proceeding to enforce compliance with any order issued under § 11(b) thereof,

> "the court as a court of equity may, . . . take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, . . . to hold or administer under the direction of the court the assets so possessed. In any proceeding . . . the trustee with the approval of the court shall have power to dispose of any or all of such assets. . . ."

## STATEMENT OF THE CASE

With respect to the merits, the statement of underlying facts in the petition and in the petitioners' brief is full of inaccuracies; but these are here disregarded as immaterial to the only question now presented, viz. whether the writ should issue.

The District Court for Massachusetts was administering the estate of International Hydro-Electric System under the Public Utility Holding Company Act of 1935 (R. 260-2). By direction of the Court Brickley as trustee of the estate (R. 306-7) had commenced suit in the District Court and in the State Court against International Paper Company claiming a rescission or in the alternative $96,000,000 damages in respect of transactions between the System and the Paper Company had in 1929 and 1932 (R. 485-515, 516-42). Before trial the parties agreed on a settlement whereby International Paper Company was to pay $10,000,000 cash and purchase $3,000,000 principal amount of a proposed bond issue (R. 311-41).

On the petition of the trustee for authority to consummate the settlement, upon notice to all interested parties (R. 307-41) and after hearing (R. 342-7), the District Judge approved the settlement by decree in which he determined that the compromise was for the best interests of the estate and that the consideration payable thereunder to the System was fair, reasonable and adequate (R. 348-53). The decree contains specific directions with respect to carrying out the settlement. It contains neither findings of fact nor conclusions of law denominated as such.

The present petitioners appealed, contending that the settlement was inadequate and that the trustee should not have settled for less than $23,000,000 (R. 807). The opinion of the Circuit Court of Appeals approving the action of the District Court (R. 1721) devotes more than 10 pages to a consideration of the arguments for and against the settlement (R. 1724-35).

**(a) Waiver of present claim by petitioners in the District Court**

The primary ground claimed by petitioners for the granting of the writ is that there should have been findings and conclusions below as in an action "tried upon the facts without a jury." Yet not only is it evident in the nature of the case that the approval of the settlement in the District Court was not a trial on the facts: the petitioners accepted this proposition in the District Court. The Judge said (R. 449):

> "There is a distinction between considering the merits of this matter and trying the case on the merits. I was referring to trying the case on the merits, which of course we are not doing at the present time."

Counsel for objecting stockholders to whom the Court was addressing these remarks agreed with this statement, and the present petitioners stood mute. Counsel for the present petitioners had previously said to the Court (R. 425):

> "So your function at this time is to get a general outline of the litigation and the possibilities of recovery and make some independent judgment of your own upon the possibilities of recovery and the defenses."

No suggestion was made in the District Court by any party that the proceeding there was a trial upon the facts, or that findings and conclusions be made.

**(b) Waiver of present claim by petitioners in the Court of Appeals**

In the Circuit Court of Appeals the petitioners claimed that there should have been detailed findings under Rule

52(a), but further urged that the Circuit Court of Appeals "should examine the record at large and make its own determination as to the propriety of the compromise and adequacy of the settlement consideration" (R. 1713), and the settlement "should be rejected by the appellate court upon its own original view and examination of the record" (R. 1714-5). Nowhere in petitioners' Statement of Points was it suggested that the case should be sent back for findings.

In their brief before the Circuit Court of Appeals, as in oral argument there, the petitioners emphasized the position so taken. After arguing the applicability of Rule 52(a), the petitioners said:

> "In this situation appellant is entitled at least to have a reversal and remand of the case for sufficient findings to enable an intelligent review." (br. p. 40)
>
> *"But instead of remanding the case for findings below, the appellate court has the power to decide and should decide for itself, the original merits of the case, where any special circumstances call for that disposition."* (br. p. 41)
>
> "In our present case there is particular urgency why the final order rejecting this settlement should be entered before December 31, 1946." (br. p. 43)
>
> "In one class of cases it sometimes happens that the trial court is in better position to pass on the acceptability of compromise offers, where controlling considerations are matters of discretion." (br. p. 46)
>
> "But in our own case the lower court was not in better position as compared with the position of this reviewing court. . . this Appellate Court will have well considered briefs of counsel and opportunity

> for full and deliberate study of the record as occasion may require—and will also have every fact before it which was available to the trial court." (br. p. 47)

This was a definite submission by petitioners to the appellate court of their entire claim with respect to the adequacy of the settlement, embracing a disclaimer of any contention that the lack of findings and conclusions rendered impossible a proper review of the settlement by the Circuit Court of Appeals. That Court accepted the invitation of the petitioners. It reviewed at some length (R. 1724-35) the arguments of all parties as to the adequacy and propriety of the settlement. Its opinion is a full, though informal, statement of findings and conclusions.

## ARGUMENT

1. ***This record presents no more than the exercise of judgment and discretion by the courts below in approving a settlement of litigation, which is not a case appropriate for review by this Court under Rule 38.***

While petitioners try to make it appear (petition p. 6) that important questions of Federal law and a probable conflict between Circuits are involved, the discussion in their brief (pp. 36-48) affirmatively shows that what they want this Court to do after assuming jurisdiction, is what they asked the Circuit Court of Appeals to do, viz. to determine the adequacy of the settlement approved by the District Court. Only in order to obtain a review of the case at large do they contend that in determining the sufficiency of the settlement the courts below erred in their procedure through asserted failure to follow Rule 52(a).

This Court has pointed out that the jurisdiction to review by certiorari was given for two purposes: first, to secure uniformity of decision among the Circuits; and second "to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort". *Magnum Import Co.* v. *Coty*, 262 US 159, 163. This Court there continued:

> "The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing."

See also *Deputy* v. *duPont*, 308 US 488, 500.

The evaluation by the courts below of the money worth of Brickley's pending litigation involved only the application of judgment and discretion to a special state of facts, not the solution of any question of Federal law or of any conflict among the Circuits. There is no suggestion by petitioners that the particular state of facts presented below, on which discretion was exercised, will ever be presented again. If this Court were to grant certiorari, the substantive question which it would be required to consider would remain the same as that already determined by the Circuit Court of Appeals, viz. whether the District Judge abused his discretion in approving the Brickley settlement. Petitioners would thereby obtain another hearing on the questions already twice decided below. That is just what this Court has so often said will not be permitted.

On this crucial defect in the petitioners' papers, i.e. the absence of any proper question for certiorari, the practice point so much labored in those papers is immaterial. The bankruptcy cases, such as *Kelley* v. *Everglades Drainage District*, 319 US 415, are not helpful to petitioners, be-

cause those do involve substantive questions under the bankruptcy power which this Court is frequently obliged to review. The requirement in those cases of findings and conclusions is explicitly imposed by statute. But even in those cases only such findings are required as are germane to the questions required to be decided by this Court. For example this Court pointed out in *Ecker* v. *Western Pacific Railroad Corp.*, 318 US 448 (a reorganization under Bankruptcy Act §77), that a separate dollar valuation of the property or claims involved was not necessary in the absence of creditors of subsidiary companies who claimed against the parent company (pp. 482-3), and thus distinguished *Consolidated Rock Co.* v. *DuBois,* 312 US 510, where such dollar valuations were deemed requisite in a different state of facts. The instant case presents an extension of the same line of reasoning. In this case, in the absence of any dispute on the facts, the application of judicial discretion to the question of the reasonableness and fairness of the settlement offer did not require detailed findings. This case does not in any aspect present a composition of claims, an allocation of securities, or a determination of priorities as in bankruptcy.

The "important question of federal law" asserted by petitioners to arise here from the supposed fact that a sweeping construction of the Public Utility Holding Company Act of 1935 is involved (petition pp. 6-8), does not arise at all. The Court of Appeals held merely that a trustee appointed under §11(d) of the Act is an officer similar to a receiver within the meaning of Rule 66 (R. 1736). Beyond that nothing whatever turned upon any provision of the Act. Neither the fact that the equitable jurisdiction of the Court derived from the Act rather than from

its general equity jurisdiction nor that it was under §11(d) that the trustee obtained his title to prosecute the cause of action which he asked authority to settle, played any part in the decision. The holding that Rule 52(a) did not apply was based wholly upon the nature of the proceeding, not on its origin.

Similarly insubstantial is the effort by petitioners to create a conflict between the First and Fourth Circuits with the citation of *In re Central States Electric Corp.*, 143 F (2d) 684 (petition pp. 13-6). In that case the Fourth Circuit stated that the District Judge had erroneously concluded that he had no discretion to order a further investigation of the advisability of bringing litigation on behalf of the estate at the instance of junior security-holders against the wishes of senior security-holders. The Fourth Circuit could properly hold that a claim seriously asserted should not be abandoned without investigation merely because that would entail expense. But no such question arises here. In the present case the relations between the Paper Companies and System out of which the asserted causes of action are said to have arisen have been fully investigated; *first* in 1931 by the Federal Trade Commission (Exh. 1, not printed, see R. 356, 1707), *second* in 1943 in the exhaustive opinion by Ropes, Gray, Boyden & Perkins (Exh. 8, R. 568-770), *third* also in 1943 in the similarly careful opinion of Robert G. Dodge (Exh. 9, R. 770-806), *fourth* in 1944 by Mr. Brickley as special counsel (R. 263-306), and *fifth* in 1944 by the parallel investigation by the Securities and Exchange Commission (see R. 378, 362). It was in the light of these five investigations that the litigation was commenced by Mr. Brickley as trustee (R. 363-4). It was this litigation which the District Judge later deter-

mined should be settled upon the basis recommended by the trustee; and it is only in connection with its own approval of the settlement that the Court of Appeals held (R. 1727) that the natural desire of junior security-holders like the petitioners to litigate at the expense of other security-holders was an item which could properly enter into the discretionary ruling which was made. The holding of the First Circuit in approving the exercise of discretion in the confirmation of the settlement, conflicts in no way with the holding of the Fourth Circuit that the District Court had power to make an investigation; and petitioners' attempt to build a parallel between the two cases is grotesque.

**2. *Independently of the foregoing argument, it is clear upon this record that no question of non-compliance with Rule 52(a) is presented.***

**(a) By its terms the rule does not apply**

The provisions of Rule 52(a) are limited to "actions tried upon the facts without a jury." But the proceedings below did not involve a trial, as the District Judge pointed out (R. 249). While pleadings were before the court, documentary material was received without regard for the rules of evidence (cf. R. 1734, footnote); no witness to fact was called; no objection was interposed by any party to the reception of material tendered; and no presentation whatever was had of International Paper Company's side of the case. The whole proceeding, in other words, was directed merely to the appraisal of the probable value of a claim in litigation, having regard to the general nature of the testimony which could possibly be elicited on either side and to all the hazards of litigation.

Hence Rule 52(a) did not apply. In the absence of triable issues of fact, as on summary judgment, findings

and conclusions are not required. *Lindsey* v. *Leavy* (CCA 9, 1945), 149 F (2d) 899, 902, cert. den. 326 US 783; cf. *Thomas* v. *Peyser* (Ct. App. D. C. 1941), 118 F (2d) 369, 374; *Schad* v. *Twentieth Century-Fox Film Corp.* (CCA 3, 1943), 136 F (2d) 991, 993.

Quite different are the cases relied upon by petitioners where issues were tendered in true adversary litigation (as in *Public Service Commission* v. *Wisconsin Telephone Co.*, 289 US 67) or where findings are indispensable to a review of a complete plan of reorganization and are consequently specifically required by statute (as in *Kelley* v. *Everglades Drainage District*, 319 US 415). In both those types of situation the District Court conducts a full trial upon the facts to the extent permitted by the nature of the jurisdiction exercised.

**(b) Applicability of Rule 66**

The Court of Appeals correctly held that, since the District Court was not trying issues on the facts but was administering an estate in equity, the trustee was in a position similar to that of a receiver (R. 1736). Hence the applicable provision of the Rules is Rule 66. In the practice of administering estates by receivers "and by other similar officers appointed by the court", it has never heretofore been suggested, so far as we can find, that the confirmation of a receiver's sale required detailed findings and conclusions; and petitioners cite no authority establishing any such requirement.

**(c) Even if applicable Rule 52(a) was complied with**

Rule 52(a) requires only what is reasonably possible in the circumstances of a given case. On the question of

valuation and judgment which is involved in the compromise of litigation detailed findings are of little or no use. They could amount to no more than a rehearsal of facts not in dispute with an appraisal of the plaintiff's chances on enumerated aspects of the litigation. Such an appraisal, if expressed in percentages, would be bound to be misleading. Only an over-all judgment representing plaintiff's chance on the whole case would be feasible in any event. That finding the District Court did make in its statements in the decree. With reference to those statements the Circuit Court of Appeals said (R. 1735-6):

> "These are findings of fact. They are ultimate facts, truly, and represent a judgment based upon the consideration of all the imponderables involved in determining whether the proposed offer met the requirements of being fair, reasonable and adequate. We do not see just what more could be asked for. Certainly the court was not required to put its guess as to the probable success of each claim and defense into a formally stated conclusion."

Thus the Circuit Court of Appeals felt it had before it all of the findings which it reasonably could expect.

In this there is nothing in conflict with *Kelley* v. *Everglades Drainage District,* 319 US 415. In that case the governing statute, Bankruptcy Act § 83(e), contained specific requirement of findings and conclusions on six specific matters (four as to fact and two as to law) as a condition to the relief provided by the section. Until those facts had been found it was impossible for the court to say whether the requirements of the Act had been met. Here on the other hand the Circuit Court of Appeals was in a position intelligently to determine the ultimate question

which was whether the District Judge had abused his discretion, and no extension of findings of fact under Rule 52(a) could have put it in better position.

**(d) Waiver by petitioners**

We have pointed out at pages 4-6 above petitioners' waiver of their present position, both in the District Court and in the Circuit Court of Appeals. It is elementary that findings are not a jurisdictional requirement and that the right thereto may be waived. *Rossiter* v. *Vogel*, (CCA 2 1945) 148 F (2d) 292, 293; cf. *Hurwitz* v. *Hurwitz* (Ct. App. D. C. 1943), 136 F (2d) 796, 799; *Goodacre* v. *Panagopoulos* (Ct. App. D. C. 1940), 110 F (2d) 716, 718. Hence, even if Rule 52(a) had been departed from in this case, the petitioners cannot complain, because they specifically asked the Circuit Court of Appeals to consider the case upon the record without remand. In so far as any failure to comply with Rule 52(a) could give the petitioners a right to remand, they waived that right. Their quarrel with the Circuit Court of Appeals is not that it failed to remand the case but that it concluded that there was no abuse of discretion in approving the settlement. They asked the Court to come to its own conclusion, and thus agreed that on the record before it the Circuit Court of Appeals could reach an intelligent conclusion on the fairness of the settlement and its practical wisdom. The petitioners asked the Court to find it unfair on that record. Implicit in this request was recognition that the Court could properly conclude that the District Judge did not abuse his discretion when he found it fair upon the same record.

## CONCLUSION

**NO IMPORTANT QUESTION OF FEDERAL LAW AND NO INCONSISTENCY OF DECISION EITHER WITH THIS COURT OR WITH OTHER CIRCUITS IS PRESENTED ON THIS RECORD SUCH AS WOULD WARRANT THE GRANTING OF A WRIT OF CERTIORARI.**

Respectfully submitted,

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New York, January 22, 1947